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82-468

No.

In the Supreme Court of the United States

October Term, 1982

WILLIAM J. McNEA, *et al.*,
Petitioners,

vs.

GEORGE VOINOVICH, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Supreme Court violates the due process clause of the Fourteenth Amendment to the United States Constitution by *sua sponte* raising and reversing the lower court upon a heretofore unreversed factual finding of the trial court, finding error as a matter of law where:

(1) Such factual finding is not raised as error in that court by the appellant;

(2) said factual finding depends solely upon the weight of the evidence and the record of the proceedings below does not contain any of the evidence offered which supports the factual finding of the trial court;

(3) the Rules of Practice of the Ohio Supreme Court place the burden upon the appellant in that court to present each error complained of in the courts below and bring forth that part of the record of proceedings below evidencing such error.

PARTIES

The Petitioners to this action are:

William J. McNea and Paul Jurcisin, Officers and members of the Cleveland Police Patrolmens Association, sworn classified employees of the City of Cleveland, Division of Police, holding the rank of Patrolman, and taxpayers of the City of Cleveland,

and

The Cleveland Police Patrolmens Association which is recognized by the City of Cleveland as the sole and exclusive collective bargaining agent on behalf of all of the Cleveland Police Department police officers, below the rank of Sergeant.

The Respondents to this action are:

George Voinovich, Mayor, City of Cleveland,

Thomas Wagner, Law Director, City of Cleveland (resigned),

Jack Cross, Treasurer, City of Cleveland,

Willard Largent, Safety Director, City of Cleveland (resigned),

Vincent Amato, Acting Safety Director, City of Cleveland (resigned),

The City of Cleveland, an Ohio municipal corporation, operating pursuant to Charter,

James Conrad, Personnel Director, City of Cleveland,

William J. Brown, Attorney General, State of Ohio,

Jeffrey Comfort and Gary N. Neid, employees of the City of Cleveland and as class representatives on behalf of a certified class of employees of the City of Cleveland,

Alan Schneider, Commissioner of Accounts, City of Cleveland,

The Cleveland Civil Service Commission,

Thomas R. Skulina, President, Cleveland Civil Service Commission,

Mary R. Bubna, Member, Cleveland Civil Service Commission,

Edward H. Mason, Secretary, Cleveland Civil Service Commission (resigned),

P.L. Fenderson, Member, Cleveland Civil Service Commission,

Edward J. Turk, Member, Cleveland Civil Service Commission.

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OPINIONS BELOW

The order and judgment of the Ohio Supreme Court denying rehearing is unreported, but is reproduced in the Appendix, page A21.

The decision and opinion of the Ohio Supreme Court is reported as *McNea v. Voinovich* (1982), 70 Ohio St. 2d 117 and is reproduced in the Appendix, pages A1 to A7.

The decision and opinion of the Ohio Court of Appeals for the Eighth Judicial District is unreported but is reproduced in the Appendix, pages A8 to A15.

The decision and judgment of the Ohio Court of Common Pleas for Cuyahoga County is unreported but is reproduced in the Appendix, pages A16 to A20.

JURISDICTION

The decision of the Ohio Supreme Court was entered on May 26, 1982. Rehearing was denied on June 23, 1982. Jurisdiction is conferred by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 14, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

City of Cleveland officials determined in August of 1980 that the City's General Fund faced a projected $8.4 million deficit for the fiscal year 1981. After failing to cure such projected deficit by failing to pass an income tax increase in a general election, City officials designed a lay-off plan in conjunction with cutbacks in employee overtime to balance the 1981 budget.

The lay-off plan called for laying off 184 employees in eight departments and not replacing 31 other employees who were leaving the City's employment for reasons other than lay-off. Included within the lay-off plan were 53

police officers employed in the Department of Public Safety. All 184 employees proposed to be laid off and the 31 employee vacancies not to be filled are compensated solely through the City's General Fund. Ninety-four of the employees scheduled to be laid off were regular appointees[1] in the Civil Service of the City, while 90 of the employees to be laid off were temporary appointees[2] in the Civil Service of the City.

The General Fund is the largest of 29 City funds. The lay-offs did not extend to any of the employees who are paid through the 28 remaining "special funds" for the reasons that those "special funds" were either (1) balanced for 1981, (2) their revenues by contract or otherwise were restricted, or (3) had internal service funds created by transfers of monies from other funds.

It was determined that at least 681 of the City's 1,100 temporary appointees were paid through the General Fund.

Based upon a long history of temporary appointees being retained on the General Fund in apparent violation of Cleveland Charter Sections 130 and 135 and the potential jeopardy to the health, safety, welfare, and morals of the taxpayers of the City of Cleveland should the lay-off of 53 basic police officers occur, Petitioners, as taxpayers, commenced the within cause on December 3, 1980.

---

1. Regular appointments are made from certified eligibility lists created by the Cleveland Civil Service Commission pursuant to competitive testing; See Sections 131 and 133 of the City Charter, Appendix A22, and Cleveland Civil Service Commission Rules 6.20 through 6.60, Appendix A24.

2. Temporary appointments are made without competitive testing nor certified eligibility lists and are limited to no more than 90 days at which time they must be tested or terminated; See City Charter Sections 130 and 135, Appendix A23, Cleveland Civil Service Commission Rules 6.70 through 6.75, Appendix A26.

The Petitioners initiated the within action by filing their Complaint in the Court of Common Pleas for Cuyahoga County, Ohio, alleging causes of action for declaratory and injunctive relief seeking to prohibit the lay-off of the 53 police officers while the City maintained on its General Fund payroll the many hundreds of temporary appointees in employment beyond the 90 day time period Petitioners allege was the maximum permitted by City Charter. A second and alternative cause of action sought to enjoin the lay-off of the police officers in that such lay-offs were excessive and as such jeopardized the health, safety, welfare and morals of the taxpayers and citizens of the City of Cleveland.

Thereafter, the Petitioners joined as a defendant class all temporary appointees on the Respondent City's General Fund, class representatives were designated, and evidence was taken by the court leading to the granting of the Petitioner's Motion for Preliminary Injunction halting the anticipated lay-offs. Subsequent thereto, the Trial Court held its full hearing on the merits of Petitioner's request for permanent injunctive relief only as contained in their Third Amended Complaint and granted the same (Appendix pages A33 to A44).

The Trial Court made two separate findings each of which independently supported its order granting the Petitioner's request for permanent injunctive relief.

First, the Trial Court found at paragraph G(3) of its Judgment Entry (Appendix page A18) that the aforementioned 681 temporary appointees held their position contrary to law thereby granting Petitioners the relief they sought in their first cause of action. Secondly, the Trial Court specifically found at paragraph K(2) of its Order:

> "That the evidence overwhelmingly establishes the present inability of the Cleveland Police Department to fulfill the responsibilities with which it is charged and which it once so admirably performed and that the proposed lay-offs of police personnel would jeopardize the health, safety, morals and welfare of the City, the residents and taxpayers thereof."

Such factual finding substantiated the allegations contained in the Petitioners' second cause of action.

Thereafter, the Respondents appealed to the Ohio Court of Appeals for the Eighth District which unanimously affirmed the judgment of the Trial Court (Appendix page A8). Respondents then appealed to the Ohio Supreme Court which reversed the lower court.

Petitioners filed their Motion for Rehearing contending that the Ohio Supreme Court had *sua sponte* raised, reviewed and found erroneous as a matter of law an unreversed factual finding of the Trial Court (the jeopardy to the health and safety of the taxpayers) not assigned as error by Respondents and without the benefit of the evidence in the record supporting such finding. The Motion was denied.

It is imperative that this Court recognize from the outset that the sole error Respondents brought before the Ohio Supreme Court was the Court of Appeals' construction of City Respondents' Charter Sections 130 and 135. Though the Respondents raised as error the factual findings of the Trial Court as to the health safety issue before the Ohio Court of Appeals, the record prepared by Respondents before the Ohio Supreme Court was void of any of the evidence offered by the Petitioners leading to such factual finding by the Trial Court. Furthermore, at no time did Respondents raise as error before the Ohio Supreme Court the manner in which the Court of Appeals dealt with such health safety issue. The reason why

they did not is clear. Respondents in their Brief to the Ohio Supreme Court stated with no uncertainty that "They will forego raising this issue in their appeal." (Appendix page A45).

Therefore, in the absence of the Respondents' raising as error the factual finding of the Trial Court that the lay-off of the patrol officers would jeopardize the health, safety, morals and welfare of the citizens of Cleveland, such determination stood unreversed before the Ohio Supreme Court. As such finding independently supported the Trial Court's issuance of its injunction, and the Ohio Supreme Court had no record containing the evidence offered on the health safety issue upon which to reverse the lower court, the Ohio Supreme Court was bound to affirm the Court of Appeals.

The effect of the Ohio Supreme Court's action was to violate the due process rights of the Petitioners thereby creating for the first time the Constitutional issue sought for review herein.

This Court has previously held that a federal claim first raised by petition for rehearing in a State court is timely for purposes of review if the occasion for it arose unexpectedly from the grounds of the State court's decision. *Great Northern Railway v. Sunburst Oil & Refining Co.* (1932), 278 U.S. 358; *Herndon v. Georgia* (1935), 295 U.S. 441. This Court has also recognized that "the federal guaranty of due process extends to State action through its judiciary as well as through its legislative, executive, or administrative branch of government." *Binkerhoff-Faris Trust & Savings Co. v. Hill* (1929), 281 U.S. 673. Therefore, the actions of the Ohio Supreme Court are subject to and ripe for review by this Court, the constitutional issue first being created by that Court's decision.

REASONS FOR GRANTING THE WRIT

The instant case presents an important issue of Constitutional law concerning a decision of the Ohio Supreme Court in which the Court disregarded its own Rules of Practice thereby denying Petitioners herein due process of law.

It is respectfully submitted by Petitioners that the Rules of Practice of the Ohio Supreme Court fall within those "processes due" individuals within the meaning of the Fourteenth Amendment to the Constitution of the United States. See, generally, *Mathews v. Eldridge* (1976), 424 U.S. 319, 47 L. Ed. 2d 18, 98 S. Ct. 893; *Boddie v. Connecticut* (1971), 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780. Given that, it is a matter of fundamental fairness to permit litigants to prepare and submit appeals to the Ohio Supreme Court in reliance upon the expectation that there will be strict uniform adherence to such Rules by the Court, and the ordinary presumptions which appellate courts practice on appeal.

Rule IV of the Ohio Supreme Court Rules of Practice defines the mandatory responsibilities of the parties in preparing and filing their individual records in that Court of the proceedings below.

"RULE IV COPIES OF RECORD IN MERIT CASES

"Section 1. Portions Required.

The appellant in all civil cases must file for the use of the Court and Reporter eighteen copies of so much of the record, testimony and exhibits as may be necessary to be considered by the Court to determine the questions presented.

"Section 3. Additional Record.

A party opposing an appeal must, within the time limited for filing his brief, file eighteen copies of such additional portions of the record, testimony and exhibits as he will rely on."

Rule V sets out the briefing requirements for both Appellant and Appellee. However, the responsibilities of the parties are different.

"RULE V BRIEF ON MERITS IN APPEAL CASES

"Section 1. Appellant's Brief.

"The appellant's brief must comply with Rule VI and contain:

"(A) A table of contents listing the table of authorities, statement of facts, argument (with the proposition or propositions of law and authorities relied upon to support the same) and appendix, all as required by the following subparagraphs of this rule, with references to the pages of the brief where each appears, and arranged as shown by the following sample:

. . .

"(D) An argument, which shall be headed by the proposition of law which the appellant contends is applicable to the facts in the case and which, if he prevails, could serve as a syllabus. See paragraph three of the syllabus of *Drake v. Bucher, Supt.* (1966), 5 Ohio St. 2d 37, 213 N.E.2d 182. If several propositions of law are contended for, the argument shall be divided by utilizing each proposition as a subheading.

. . .

"Section 2. Brief Opposing Appeal.

"Within thirty days of the filing of appellant's brief, the party opposing the appeal shall file a brief in form complying with the provisions of this rule and Rule VI and answering the appellant's contentions and making any other contentions deemed appropriate as reasons for affirmance of the order or judgment appealed from."

Rule IV clearly places an express burden upon the appellant to submit only that evidence necessary for the court to determine the errors presented for review. Likewise, another burden rests upon the appellant under Rule V to set out the specific errors raised for review. If necessary, the appellee may supplement the record under Rule IV with additional evidence in support of his argument opposing the appeal.

Implicit within these rules is a reliance factor in favor of the appellee that the scope of the appeal will be limited to that evidence and assigned errors submitted by the appellant and whatever additional portions of the record the appellee will rely upon.

This "burden" and "reliance" concept has been expressly recognized by the Ohio Supreme Court. *Ostrander v. Parker-Fallis Insulation Co., Inc.* (1972), 29 Ohio St. 2d 74; *Lynch v. Doran* (1968), 13 Ohio St. 2d 9; Rule 9, Ohio Rules of Appellate Procedure. The Ohio Supreme Court stated in *Ostrander* at 74:

"Finally, appellant contends that the evidence adduced at trial was insufficient to establish that Lavelle was acting in the course and scope of his employment. However, appellant filed only a partial bill of exceptions in the Court of Appeals. It was not certified as containing all of the evidence adduced on the issue of

respondeat superior. In effect, appellant would have us shift the burden to appellee to complete the partial bill of exceptions when the challenge goes to the insufficiency of the evidence to support the judgment upon a particular issue. This is not the rule."

This burden is placed upon the appellant for a very important reason. In the absence of a complete record of the proceedings below "all reasonable presumptions consistent with the record will be indulged in favor of the regularity and legality of the proceedings below." *Furnishings for Courtroom Two* (1981), 66 Ohio St. 2d 427; *Ostrander v. Parker-Fallis Insulation Co., Inc., supra; Beach v. Sweeney* (1958), 167 Ohio St. 477; 4 OHIO JURISPRUDENCE 2d Appellate Review §§248,552 and 553.

While it is clear that the Ohio Supreme Court and the lower Ohio appellate courts can raise and determine errors in the record which they discover but which have not been specifically raised by appellants, See e.g. *Garrison Carpet Mills v. Lenest, Inc.* (1979), 65 Ohio App. 2d 251; §2505.21 Ohio Revised Code, a prerequisite to judicial review is the existence of the evidence in the record supporting that discovered error. In absence of that evidence, the presumption of regularity and legality of the proceedings below must be indulged by the Court. *Furnishings for Courtroom Two, supra.*

The record before the Ohio Supreme Court was void of any of the evidence offered by the Petitioners to the Trial Court on the jeopardy to the health and safety of the citizens of Cleveland should the lay-offs occur. The reason why is clear. All Respondents in their Brief on the merits stated with no uncertainty that "they will forego raising this issue in their appeal." (Respondents' Brief, Appendix page A45). Under the provisions of Rules IV and V of

the Rules of Practice of the Ohio Supreme Court, Petitioners were under no obligation to supplement Respondents' record before the Ohio Supreme Court with the additional evidence offered on an issue (health-safety) which the Respondents knowingly chose not to pursue before that Court. Rather, Petitioners justifiably relied upon Respondents' record.

There can be no question but that the Respondents understood and recognized the health-safety issue as they thoroughly briefed it before the Ohio Court of Appeals. Yet, even after Petitioners filed their Brief in the Ohio Supreme Court raising the lower Court's findings on the health-safety issue as an independent basis for affirming the Court of Appeals, Respondents *still failed* to supplement or amend their record or brief this issue in any manner. The only logical conclusion is that Respondents chose not to pursue that issue before the Ohio Supreme Court and were satisfied with the treatment received from the lower courts. What lends force to this argument is that the Ohio Court of Appeals for the Eighth District, Appendix page A8, indicates that there were other important issues in addition to the health-safety issue which Respondents initially assigned as error before the Ohio Court of Appeals, but chose not to raise before the Ohio Supreme Court. One such issue was the timeliness of the demand by the Petitioners to the City Law Director to commence suit, a jurisdictional issue.

Therefore, for the Ohio Supreme Court to state unequivocally that it cannot accept the Trial Court's unreversed conclusion that the lay-off of the police officers would endanger the health, safety, welfare and morals of the citizens of Cleveland as a matter of *law* without first reviewing all of the evidence presented by the Petitioners which resulted in this factual finding, violates the Ohio Supreme Court's own express Rules of Practice and nulli-

fies the long line of decisions of that Court which require the Court, in the absence of a complete record, to indulge all reasonable presumptions of the regularity and legality of the proceedings below. This is especially true when the unreversed conclusion goes to the weight of the evidence.

The principle Petitioners espouse is so constitutionally fundamental that Petitioners are unable to locate a single decision of this Court where the binding effect of a State appellate court's rules of practice upon the court itself has been reviewed.

In *Yturbides Executors v. United States* (1859), 63 U.S. 290, this Court stated:

> "It must be admitted that, as to the matter of filing papers and the entry of rules under the practice of the court, such modifications may be made as may facilitate the progress of the court and the convenience of the parties; and, indeed, the court may, under peculiar circumstances, avoid an act of injustice by the suspension of its rules; but this can only be done where the discretion of the court may be fairly exercised."

In *Rio Grande Irrigation and Colonization Company v. Gildersleeve* (1898), 174 U.S. 603, 19 S. Ct. 761 it was held by this Court that a rule of court in which no discretionary power was reserved to the trial judge, is mandatory upon the court and the court could not suspend its enforcement.

> "A rule of law thus authorized and made has the force of law and is binding upon the courts as well as upon parties to an action and cannot be dispensed with to suit the circumstances of any particular case."

Rio Grande Irrigation and Colonization Co. v. Gildersleeve, supra.

It is respectfully urged that the Ohio Supreme Court's determination that an unreversed factual finding by the Trial Court is erroneous as a matter of law without first having the benefit of reviewing all the evidence supporting such finding, abrogates the mandatory Rule requirements of the Ohio Supreme Court Rules of Practice upon an appellant of defining the scope of the appeal. The effect is to shift to the appellee the burden of completing the appellant's record, or rely upon the appellant's record at his own risk.

This would require an appellee to engage in speculation as to which undisturbed lower court findings might be reviewed on the pretense of being a matter of law instead of responding to the record and error presented by the appellant as is expressly anticipated under Rules IV and V of the Ohio Supreme Court Rules of Practice.

It is respectfully urged that fundamental fairness dictates that Petitioners herein have a vested Fourteenth Amendment expectancy interest to rely upon the uniform application of the Rules of Practice of the Ohio Supreme Court. As it pertains to the case at bar, that expectancy interest is found in Petitioners' reliance under Rule IV that the review of the Ohio Supreme Court would be limited to that evidence presented by the litigants in the record of proceedings. That reliance interest does not and cannot anticipate the Ohio Supreme Court characterizing an undisturbed factual finding of the Trial Court not brought as error by the Appellants as an issue to be reviewed as a "matter of law" without first reviewing the evidence supporting such finding.

CONCLUSION

The Ohio Supreme Court has deprived Petitioners of due process of law under the Fourteenth Amendment to the United States Constitution by modifying without prior notice the "process due" Petitioners in the within cause. The specific "process due" Petitioners is the strict adherence by the Ohio Supreme Court to Rules IV and V of its Rules of Practice. In this case, the Court deviated from its own procedures without prior notice to Petitioners.

The modification occurred when the Ohio Supreme Court *sua sponte* raised and reversed the lower Court upon an heretofore unreversed factual finding of the Trial Court finding error as a matter of law where such finding was not assigned as error by the Respondent and without all of the evidence offered supporting such finding.

Petitioners urge this Court to grant their petition for Writ of Certiorari to review the decision of the Ohio Supreme Court in this case.

Respectfully submitted,

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